Supreme Court, U.S.
FILED
MAR 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1248

In the Supreme Court of the United States

OCTOBER TERM, 1988

ASSOCIATED MILK PRODUCERS, INC. and
MID-AMERICA DAIRYMEN, INC.,
Petitioners,

vs.

NATIONAL FARMERS' ORGANIZATION, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONERS

Major W. Park, Jr.
Counsel of Record
Jeffrey W. Bruce
Rebecca L. Milne
Gage & Tucker
2345 Grand Avenue
Kansas City, Missouri 64108
(816) 474-6460
Counsel for Petitioner
Mid-America Dairymen, Inc.

Eugene Gressman
Of Counsel
1111 Raymond Boulevard
Newark, New Jersey 07102
(201) 642-8844

Donald M. Barnes
Counsel of Record
Salvatore A. Romano
Joyce L. Bartoo
Arent, Fox, Kintner, Plotkin
& Kahn
1050 Connecticut Ave., N.W.
Washington, D.C. 20036-5339
(202) 857-6000

Colvin A. Peterson, Jr.
Watson, Ess, Marshall &
Enggas
1010 Grand Avenue
Kansas City, Missouri 64106
Counsel for Petitioner
Associated Milk Producers,
Inc.

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

TABLE OF CONTENTS

TABLE OF CONTENTS I
TABLE OF AUTHORITIES I
THE EIGHTH CIRCUIT'S DISREGARD OF RULE 52(a) 1
THE EIGHTH CIRCUIT'S ADOPTION OF A "LESSER STANDARD OF PROOF" AND ITS SHIFTING OF THE BURDEN OF PROOF TO PETITIONERS 3
THE FAILURE TO ACCOUNT FOR THE EFFECTS OF LAWFUL COMPETITION 5
CONCLUSION 7

TABLE OF AUTHORITIES

Anderson v. City of Bessemer City, 470 U.S. 564 (1985) 2, 3
J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557 (1981) 4
Locklin v. Day-Glo Color Corp., 429 F.2d 873 (7th Cir. 1970) 4
Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969) 4

No. 88-1248

In the Supreme Court of the United States

OCTOBER TERM, 1988

ASSOCIATED MILK PRODUCERS, INC. and
MID-AMERICA DAIRYMEN, INC.,
Petitioners,

vs.

NATIONAL FARMERS' ORGANIZATION, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONERS

Petitioners Associated Milk Producers, Inc. ("AMPI") and Mid-America Dairymen, Inc. ("Mid-Am") respectfully submit this reply to the Opposition Brief ("Opp. Br.") of respondent National Farmers' Organization, Inc. ("NFO").

THE EIGHTH CIRCUIT'S DISREGARD OF RULE 52(a)

NFO's response to the important issue presented by the Eighth Circuit's complete disregard of the commands of Rule 52(a) mischaracterizes the record, ignores the credibility determinations and other de novo factual findings made by the Eighth Circuit, and ignores the leading decision of this Court regarding the scope of appellate review under Rule 52(a).

1. In *NFO IV* the Eighth Circuit violated virtually all of the cardinal commands regarding the scope of appellate review under Rule 52(a). The most egregious example is the Eighth Circuit's reversal of the District Court's credibility findings. In *NFO III* the District Court had rejected as not credible the unsupported testimony of three NFO employees, upon which NFO had relied to support at least two factual assumptions critical to its damage theory. *See* Petition for Certiorari ("Pet.") at 20. The Eighth Circuit simply ignored the District Court's credibility findings and in a *de novo* review of the record proceeded to rely upon the discredited testimony of these witnesses to support its ultimate finding that NFO had suffered substantial damages. The Eighth Circuit cited no extrinsic evidence to support its contrary factual findings and never mentioned the District Court's credibility findings. Rule 52(a) demands "even greater deference" to a trial court's findings when they are based upon the credibility of witnesses. *Anderson v. City of Bessemer City,* 470 U.S. 564, 575 (1985). Nowhere in its brief does NFO address this issue.

2. NFO simply is wrong in stating that the District Court's factual findings were merely conclusory and therefore not worthy of the appellate deference required by Rule 52(a). Opp. Br. at 15. The District Court made specific and extensive findings of fact on all damage issues, damage theories and underlying assumptions. *See NFO III,* 614 F. Supp. 745, 758-804; App. E at 82-167. NFO's contention that its damage evidence was "largely" composed of statistics and "undisputed" matters of history also ignores the record. Opp. Br. at 15. NFO's damage model was based upon numerous factual assumptions, nearly all of which the District Court rejected

after careful analysis for lack of credible evidentiary support. *See* Pet. at 20.

3. In *NFO IV* the Eighth Circuit completely ignored the standards announced in *Bessemer City,* the leading Rule 52(a) decision. If left unreviewed, the Eighth Circuit's opinion in *NFO IV* would create an unprecedented exception to the Rule 52(a) standards for antitrust damage proof.

THE EIGHTH CIRCUIT'S ADOPTION OF A "LESSER STANDARD OF PROOF" AND ITS SHIFTING OF THE BURDEN OF PROOF TO PETITIONERS

1. The Eighth Circuit, relying upon an erroneous interpretation of four decisions from this Court, adopted a "lesser standard of proof" than "preponderance of the evidence." Pet. at 10-13. The Eighth Circuit's adoption and application of this new standard in *NFO IV* permits an appellate court to usurp the function of the fact-finder, in violation of Rule 52(a), by substituting its own contrary factual conclusions and inferences from a cold record and awarding substantial antitrust damages based solely upon its finding of an antitrust violation. Pet. at 13.

NFO completely ignores this crucial point in its brief and does not address the glaring inconsistency between the Eighth Circuit's new "lesser standard of proof" and the strictures of Rule 52(a) and elementary principles of antitrust law. Indeed, this new "lesser standard" effectively relieves an antitrust plaintiff of the burden of proving a causal nexus between the defendant's wrongful conduct and the damages claimed.

2. The question raised in this case (in which the District Court found no credible evidence of antitrust injury or damage but the Eighth Circuit independently found sufficient evidence of substantial damages) concerns the quantum and quality of proof necessary to provide an evidentiary basis for a "just and reasonable" damage estimate. This Court has held that an antitrust damage award must be more than mere "speculation or guesswork," *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 124 (1969), that it must be "based on relevant data," *id.*, and that the plaintiff's evidence must be "sufficient to support a jury [or fact-finder] award even under our relaxed damage rules," *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 567 (1981).

This Court has never addressed the very practical evidentiary and proof problems presented in this case. NFO claims (Opp. Br. at 6-7) that several Circuits have held that a standard less than a preponderance suffices, although how much less is not made clear. On the other hand, Petitioners have cited (Pet. at 12) several Circuit decisions to the effect that the antitrust plaintiff must prove the amount of its damages by a preponderance of the evidence. *See, e.g., Locklin v. Day-Glo Color Corp.*, 429 F.2d 873, 879 (7th Cir. 1970). This conflict among the Circuits alone warrants review by this Court to resolve important and recurring problems in antitrust cases.

3. NFO takes inconsistent positions regarding the Eighth Circuit's shifting of the burden of proof. First, NFO contends that the Eighth Circuit "did not place the burden of proof upon Petitioners." Opp. Br. at 9. Later, however, NFO states that "[P]etitioners carry a

significant burden in seeking a damage reduction" based upon the effects of lawful competition. *Id.* at 10 n.6. These inconsistent positions highlight both the confusion resulting from the Eighth Circuit's opinion and the need for clarification by this Court.

THE FAILURE TO ACCOUNT FOR THE EFFECTS OF LAWFUL COMPETITION

1. In contrast to at least five other Circuits, the Eighth Circuit did not reject a damage theory that did not exclude the effects of significant lawful competition and instead shifted the burden to Petitioners to prove the basis for and the amount of an adjustment for lawful conduct. Pet. at 15-18. NFO's brief fails to address this conflict among the Circuits.

2. NFO suggests that Petitioners are advocating a rule whereby "the mere presence of some lawful acts" requires complete rejection of a damage claim. Opp. Br. at 11. Petitioners advanced no such rule. This case does not involve "the mere presence of some lawful acts." Many significant acts by Petitioners, assumed by NFO's damage expert to be unlawful and the basis of his damage computations, subsequently were found by the District Court and the Eighth Circuit to be entirely lawful. *See* Pet. at 16 n.8. Indeed, one of these lawful acts, an alleged conspiracy by milk dealers to boycott NFO, was described by NFO as the "heart" of its damage claim in Chicago. That claim was rejected by the Eighth Circuit in *NFO II*, 687 F.2d at 1199, App. F at 274. Despite being given the opportunity to do so on remand, NFO failed to make any adjustment in its damage projections to account for the impact of the many lawful acts previously assumed to be unlawful.

3. NFO erroneously states that Petitioners will be given the opportunity to litigate the issue of the effect of lawful competition on remand. Opp. at 10. NFO was afforded the opportunity on the first remand in *NFO III* to reopen the record in order to remedy its flawed damage theory, but NFO expressly declined to do so. In *NFO IV*, the Eighth Circuit expressly ordered the record closed on remand, thus precluding Petitioners the opportunity to litigate this issue. Petitioners bear the burden of attempting to correct NFO's flawed damage theory on the basis of the *existing* record.[1]

---

1. When all else fails, NFO falls back upon a well-worn red-herring—destruction of documents—to avoid the important issues in this case. There are several answers to this repeated attempt at poisoning the well. First, document destruction is irrelevant to the important legal issues raised in this case. Second, the issue of document destruction was removed from the case years ago, when the District Court ruled on the matter (*NFO III*, 614 F. Supp. at 751-57; App. E at 69-82) and both NFO and AMPI were found to have destroyed documents. AMPI and NFO then settled the issue pursuant to the District Court's ruling. Third, under NFO's faulty reasoning, *Petitioners* would be entitled to an adverse inference that the documents NFO destroyed would have shown that NFO did not suffer any damages. In short, this issue is irrelevant, has been long settled and is interposed solely to create prejudice and obscure the important legal issues raised by the innovative decision of the Eighth Circuit in *NFO IV*.

CONCLUSION

For the reasons discussed in this Reply Brief and in the Petition for Writ of Certiorari, Petitioners respectfully request that a Writ of Certiorari issue to review the judgment and opinion of the Eighth Circuit in *NFO IV*.

Respectfully submitted,

Major W. Park, Jr.
Counsel of Record
Jeffrey W. Bruce
Rebecca L. Milne
Gage & Tucker
2345 Grand Avenue
Kansas City, Missouri 64108
(816) 474-6460
Counsel for Petitioner
Mid-America Dairymen, Inc.

Eugene Gressman
Of Counsel
1111 Raymond Boulevard
Newark, New Jersey 07102
(201) 642-8844

Donald M. Barnes
Counsel of Record
Salvatore A. Romano
Joyce L. Bartoo
Arent, Fox, Kintner, Plotkin & Kahn
1050 Connecticut Ave., N.W.
Washington, D.C. 20036-5339
(202) 857-6000

Colvin A. Peterson, Jr.
Watson, Ess, Marshall & Enggas
1010 Grand Avenue
Kansas City, Missouri 64106
Counsel for Petitioner
Associated Milk Producers, Inc.

March 13, 1989